

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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| Commonwealth Edison Company |) | |
| |) | |
| |) | ICC Docket No. 16-0259 |
| Annual Formula Rate Update and |) | |
| Revenue Requirement Reconciliation |) | |
| Under Section 16-108.5 of the Public |) | |
| Utilities Act |) | |

**BRIEF ON EXCEPTIONS AND EXCEPTIONS OF
THE PEOPLE OF THE STATE OF ILLINOIS**

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October 28, 2016

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**EXCEPTIONS AND BRIEF ON EXCEPTIONS OF
THE PEOPLE OF THE STATE OF ILLINOIS**

The People of the State of Illinois, by Attorney General Lisa Madigan (“the People”), submit this Brief on Exceptions addressing the revenue that will be collected from Commonwealth Edison Co. (“ComEd” or “the Company”) consumers in calendar year 2017. The People will address one issue: the erroneous prudence standard applied to the conclusions on the voltage optimization validation study. Proposed Language is included after the argument on Exception 1.

EXCEPTION 1

The Proposed Order Applies A Legally Incorrect And Excessively Restrictive Prudence Standard In Its Conclusions On The Voltage Optimization Validation Study.

The People take exception to way the Proposed Order describes the prudence standard on page 14 and submit that the standard is unsupported by precedent and is erroneous. While the language included in the Proposed Order’s Conclusion on the Voltage Optimization Validation Study appears to be taken from ComEd’s arguments, that language is not consistent with the definition of prudence that can be found in the

cases cited in the Proposed Order at page 11. The Proposed Order should be modified so that the correct legal standard is applied.

The Proposed Order says at page 15: “as ComEd points out, to be imprudent, an action or omission must not only be shown to have been wrong, but to have been outside the realm of reasoned disagreement based on the information available at the time it was made.” While ComEd argued that this is the prudence standard (see page 11 of the Proposed Order), it is not. The cases cited by ComEd and in the Proposed Order at page 11 describe the standard for prudence as follows:

Prudence is the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made.” We also note, however, that the prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being “imprudent.” *Illinois Commerce Comm’n v. Commonwealth Edison Co.*, Ill. Commerce Comm’n Op. 84–0395 (October 7, 1987).

Illinois Power Co. v. Illinois Commerce Comm’n, 339 Ill.App.3d 425, 435 (5th Dist.

2003). A fuller discussion of the prudence standard is found in a 2008 Illinois Power case where the court said:

Prudence is not defined within the Act. Commerce Commission proceedings and our court have defined prudence as “that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made.” *Illinois Commerce ***540 **684 Comm’n v. Commonwealth Edison Co.*, Docket No. 84–0395, p. 17 (1987); *Illinois Power Co. v. Illinois Commerce Comm’n*, 339 Ill.App.3d 425.435, 274 Ill.Dec.1, 790 N.E.2d 377 (2003). In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. *Illinois Power Co. v. Commerce Comm’n*, 245 Ill.App.3d 367, 184 Ill.Dec. 49, 612 N.E.2d 925 (1993).

Illinois Power Co. v. Illinois Commerce Comm'n, 382 Ill.App.3d 195, 201 (3d Dist.

2008). In discussing the standard applied by the Appellate Court (rather than by the Commission), the Court said:

An appellate court's jurisdiction of direct appeals from the Commission is governed by section 10–201 of the Act ([220 ILCS 5/10–201 \(West 2002\)](#)). Section 10–201(e)(iv) states that we may only reverse a Commission order if we conclude that “[t]he findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such * * * order.” [220 ILCS 5/10–201\(e\)\(iv\) \(West 2002\)](#). The Commission's findings of fact are to be accepted as *prima facie* true. [Business and Professional People for Public Interest v. Illinois Commerce Comm'n](#), 146 Ill.2d 175, 166 Ill.Dec. 10, 585 N.E.2d 1032 (1991); [220 ILCS 5/10–201\(d\) \(West 2002\)](#). Merely showing that the evidence presented would support a different conclusion than the one reached by the Commission is not sufficient. Rather, the appellant must affirmatively demonstrate that the opposite conclusion is “clearly evident.” [Continental Mobile Telephone Co. v. Illinois Commerce Comm'n](#), 269 Ill.App.3d 161, 206 Ill.Dec. 511, 645 N.E.2d 516 (1994)

Id. While the appellate standard is somewhat different from the Commission's standard, the conclusion that a different conclusion is “clearly evident” is not nearly as strict as ComEd's recommended conclusion that the challenged decision “must not only be shown to have been wrong, but to have been outside the realm of reasoned disagreement based on the information available at the time it was made.” Proposed Order at 11 (describing ComEd's position) and at 15 in Commission Conclusion. It is important to note that no authority is cited for this extremely rigorous standard in the Proposed Order or in ComEd's Initial Brief at 16.

The implications of this new “outside the realm” standard should not be understated. It effectively limits the Commission's ability to review utility actions for prudence by requiring Commission approval of all but the most egregious action, i.e.

action that is “outside the realm of reasoned disagreement based on the information available at the time it was made.” The People do not dispute that prudence is reviewed in light of information known at the time. However, meaningful review means that the utility must exercise “the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made,” recognizing that the “prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being ‘imprudent.’” *Illinois Power Co.*, 339 Ill.App.3d at 435 (quoted above). Recognizing honest differences of opinion in determining whether an action is prudent is a far cry from limiting review to decisions that are so extreme as to be “outside the realm of reasoned disagreement.”

In its conclusion on whether ComEd’s Voltage Optimization Validation Study cost was prudent, the Proposed Order applies the incorrect and excessively strict standard ComEd proposed. Proposed Order at 15. That standard is without legal foundation, unreasonably limits Commission review of utility actions, and should be rejected. At the same time, while the problems that the People identified with the validation study are substantial (see Proposed Order description at pages 13-14 and in the People’s Initial and Reply Briefs), the People did not recommend a disallowance in this docket because the validation study costs are projected and subject to review when the costs are reconciled in a later formula rate docket.

The People identified multiple issues associated with the validation study that ComEd should consider now, at the time decisions are being made. Because the validation study has not occurred, and the design and scope of the validation study may

change, it is not possible or appropriate to conduct a full prudence review in this docket. However, in light of the People's testimony, it cannot be said that ComEd was not aware of the issues associated with the validation study at the time decisions are being made.

PROPOSED LANGUAGE

The language on page 14-15 should be modified as indicated below to state the correct legal standard for prudence. In the alternative, the highlighted language can simply be removed because the conclusion does not conduct a prudence analysis.

Commission Analysis and Conclusion

ComEd includes approximately \$4 million in capitalized costs in projected plant related to a VO validation study. The AG questions whether the expenditures are reasonable and prudent; however, the AG does not make a recommendation to disallow any of the costs. The AG claims the VO validation study is insufficient and disagrees with the design of the study, but does not disagree that there should be VO investments.

In this proceeding, the Commission is making a determination on the prudence and reasonableness of including \$4 million in capitalized costs in projected plant relating to the VO validation study. The Commission takes note of the AG's concerns regarding the VO validation study and future VO policy issues, and will not address them now in light of the fact that the validation study has not been finalized. When reviewing an action for prudence, the Commission recognizes that "[p]rudence is the standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made." We also note, however, that the prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being 'imprudent.'" Illinois Power Co. v. Illinois Commerce Comm'n, 339 Ill.App.3d 425, 435 (5th Dist. 2003). ~~However, as ComEd points out, to be imprudent, an action or omission must not only be shown to have been wrong, but to have been outside the realm of reasoned disagreement based on the information available at the time it was made.~~ There is insufficient evidence to make any such determination of imprudence here that would support a reduction of these expenditures. ~~There is no evidence in this proceeding that shows the costs at issue are unnecessary or excessive, or would necessarily be without benefit. Nevertheless, n~~Nothing in this docket will limit the Commission's authority to assess the reasonableness and prudence of actual expenditures in future FRU proceedings.

WHEREFORE, the People of the State of Illinois respectfully request that the Commission enter a Final Order consistent with the recommendations in their Exception and Brief on Exceptions.

Respectfully submitted,

People of the State of Illinois
By Lisa Madigan, Attorney General

By: ____/s/_____

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